IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 55 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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MAHESHBHAI BHIKHABHAI ZALA

Versus

SUB DIVISIONAL MAGISTRATE

Appearance:

1. Special Criminal Application No. 55 of 2001

MR SK BUKHARI for Petitioner

MR HL JANI, Learned APP for Respondents

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 27/07/2001

ORAL JUDGEMENT

1. Heard Mr.S.K.Bukhari, learned advocate for the petitioner and Mr.H.L.Jani, learned APP for the respondents.

2. In the present petition, the show cause notice

has been issued on 21/8/99 by the Sub-Divisional Magistrate, Nadiad to the petitioner and, thereafter, the order of externment has been passed on 30/12/99 by the Sub-Divisional Magistrate, Nadiad. According to the externment order, three offences have been registered against the present petitioner at Kathlal Police Station. However, the petitioner has been removed from adjoining Districts of Kheda, Anand, Ahmedabad City, Ahmedabad Rural, Panchmahals and Sabarkantha. The petitioner has replied the show cause notice and, thereafter, the matter was heard by the concerned Authority and ultimately, the Sub-Divisional Magistrate, Nadiad has passed an order of externment against the present petitioner to extern for the period of two years from the adjoining Districts of Kheda, Anand, Ahmedabad City, Ahmedabad Rural, Panchmahals and Sabarkantha. The appeal has been preferred by the present petitioner. The said appeal was rejected by the Appellate Authority on 19/4/2000.

3. Mr.S.K.Bukhari, learned advocate for the petitioner has submitted that in externment order the concerned authority has not discussed the evidence led before him and has not given any reason in support of his conclusion or has also not given any detailed as to which evidence was relied and which evidence was not relied by the concerned authority. The first contention, which has been raised by Mr.Bukhari is that the order of externment is not a speaking order. The second contention which has been raised by Mr.Bukhari is that the statements of the secret witnesses have been taken into account in the enternment order, which fact has not been disclosed by the concerned authority in show cause notice and, therefore, the requirement of Section 59 of the Act has not been strictly complied. It resulted in denying effective and reasonable opportunity to the petitioner to make a representation in respect to the adverse material which has been taken into account by the concerned authority. Therefore, on both these contentions, the order of externment which has been passed by the Sub-Divisional Magistrate, Nadiad, is required to be quashed and set aside.

4. Mr.H.L.Jani, learned APP for the respondents has supported the order of externment passed by the Sub-Divisional Magistrate, Nadiad as well as the order of the Appellate Authority and has submitted that looking to the offences which have been registered against the present petitioner at Kathlal Police Station and considering the statements of the secret witnesses, there was no option with the concerned authority except for passing an externment order and, therefore, the order of

externment has rightly been passed by the concerned authority which is legal and valid and the Appellate Authority has also rightly rejected the appeal and, therefore, no interference is required by this Court.

5. I have heard the learned advocates for the respective parties. In respect to the first contention, looking to the show cause notice itself and the order of externment it is clear that the petitioner has been removed from adjoining Districts. There is no reason given by the concerned authority as to why the petitioner was required to be removed from adjoining districts, when there was no incident or offence committed by the petitioner in adjoining Districts. Therefore, the show cause notice itself amounts to non-application of mind. Similarly in the externment order also, the concerned authority has not discussed these aspects as to why the petitioner has been removed from adjoining Districts and therefore, the order of externment is required to be quashed and set aside.

6. The second contention raised by the learned advocate for the petitioner is that the statements of the secret witnesses have been recorded by the concerned Authority prior to the issue of the show cause notice and the same has been relied upon by the respondent No.1 at the time of passing the externment order but this fact has not been disclosed by the respondent No.1 in the show cause notice and no statements were supplied to the present petitioner. Therefore, the effective reasonable opportunity, which is required to be given by the respondent No.1 before passing the order of externment as per Section 59 of the Act is not given to the petitioner and, therefore, the order of externment is required to be quashed and set aside.

7. The relevant provisions of Section 59[1] of the Act which are relevant to the facts of the present case, are quoted as under :-

"59. Hearing to be given before order under Section 55, 56 or 57 is passed :-

[1] Before an order under Section 55, 56 or 57 is passed against any person the officer acting under any of the said sections or any officer above the rank of an Inspector authorised by that officer shall inform the person in writing of the general nature of the material

allegations against him and give him a reasonable opportunity of tendering an explanation regarding them. If such person makes an application for the examination of any witness, produced by him, the authority or officer concerned shall grant such application; and examine such witness, unless for reasons to be recorded in writing, the authority or officer is of opinion that such application is made for the purpose of vexation or delay. Any written statement put in by such person shall be filed with the record of the case. Such person shall be entitled to appear before the officer proceeding under this section by an advocate or attorney for the purpose of tendering his explanation and examining the witness produced by him.

[2] ----------"

8. While reading sub section referred to above, it is important to note that it is the duty of the respondent No.1 to give reasonable opportunity to the petitioner before passing the externment order against the petitioner. The language, which has been used in a particular section, has provided that the officer shall inform the person in writing of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them. Therefore, this is a reasonable opportunity of tendering explanation given to the petitioner which requires to be satisfied before passing the externment order against the present petitioner.

9. In the present case, there is no dispute on record that in show cause notice, no such material is referred by the respondent No.1 that statement of the secret witnesses were recorded and obtained by the concerned authority. This fact has not been disclosed in the show cause notice which has been served to the petitioner. In light of this undisputed fact, the view taken by the Division Bench of this Court in the case of RAMBHAI KHIMCHAND V. STATE OF GUJARAT, reported in 1990 [2] GLH 625, is relevant and the relevant observations in para-(9) are as under :-

"9. As far as the present case is concerned, it cannot be said that unsubstantial or non-existent ground has been taken into

consideration, but a ground which is germane for the purpose of externing a particular person has been taken into consideration by the externing authority without putting the externee on notice as regards that ground. If that be so, the Court cannot substitute objective judicial test for the subjective satisfaction of the executive authority and come to the conclusion that the executive authority, dehors the said ground which has not been put on notice to the externee was able to arrive at a decision for the purpose of externing the person concerned in that particular case. Thus, it is clear that reference to a particular instance such as persons of status and means have shifted from the locality so that they may not become the victim of such tort committed by the petitioner herein is a clear instance to show that the activities of the petitioner concerned have reached that degree of harm to the society that the interest of the society or even of that particular locality required that this individual who has become a public menace should be externed from the locality. This particular instance has not been put on notice to the externee though it finds place in the externment order. Natural justice requires that the person affected should have notice of the relevant materials on which the authority concerned bases its conclusion. The fact that the persons with status and means have shifted from their place so that they may not become victim of such torts by the externee concerned is one of the essential and relevant circumstance for externing a person. This essential circumstance on which the externing authority relied was not put on notice to the externee. As we have stated already this circumstance finds place in the order of externment. The failure on the part of the externing authority to put on notice to the externee regarding this particular circumstance, in our opinion, clearly vitiates the order of externment and offends the principle of fair play and justice. For all these reasons the order of externment is quashed and set aside. Rule is made absolute."

10. In a decision rendered by the Bombay High Court in the case of MEHMOOD BABU KAWAL @ DAWARYA SHAIKH V/S. ASSISTANT COMMISSIONER OF POLICE, CITY STATION, PUNE, reported in 1991, Cr.L.R. (Mah.) 359. The Bombay High Court has made following relevant observations :-

"2. With the Assistance of the learned counsel of both the parties, we have gone through the show cause notice dated 9th January, 1990 issued under Section 56-B of the Bombay Police Act as well as the order of Externment passed under Section 56 of the said Act. On perusal of the show cause notice and the order of externment, we find that the order of externment specifically catalogued three criminal cases under Prohibition Act registered and pending against the Externee. The said cases were not referred to at all in the show cause notice. A perusal of the impugned order further shows that the Externing Authority has in fact taken into consideration the fact that the petitioner deals in the sale of liquor and has been involved in offences under the Prohibition Act which is clear from his satisfaction recorded below the catalogue. He has stated that after considering the entire evidence placed before him and the reply advanced, he is satisfied that the proposed externee deserves to be externed. It is thus apparent that material extraneous to the show cause notice was taken into consideration at the time of passing of the Order of Externment and, therefore, the Order of Externment is vitiated having been passed against the principles of natural justice. On this ground alone, the impugned order is liable to be set aside. We further find that in the show cause notice about 5 incidents of criminal acts of the proposed externee were cited but the date and the time of the incidents had been mentioned without reference to the locality where the alleged incident had taken place. A general nature of material particulars is necessary to be given to the proposed Externee so as to offer him adequate opportunity to show cause against the allegations. In the instant case, since various localities of Pune City are allegedly affected by the prejudicial activities of the proposed externee, it was necessary to give general particulars of the area where the alleged incidents had taken place. For all these reasons, stated above, we find that the order of externment is vitiated and has to be set aside."

11. In one more decision rendered by this Court in the case of ASWIN CHANDULAL JAISHWAL V/S. THE DEPUTY COMMISSIONER OF POLICE, VADODARA CITY, reported in 1989,

Cr.L.R. (Guj.) 517, this Court has in para-(9) made following relevant observations :-

> "9. Shri Gupta has also stated in his affidavit that the Inspector, Vadi Police Station, Vadodara, had recorded statements of 11 persons in confidence. He further stated that he had applied mind on the relevant material of the case produced before him, which includes the statement of the persons recorded by the police. It is not stated in the notice that the statements of the witnesses were recorded by the police. If at all any such statements would have been recorded and intended to be relied upon, at least, reference of the statements, without disclosing the names, with the time and place of such alleged illegal activities of the petitioner should have been made in the notice so that the petitioner could have got an opportunity to explain the said circumstances or lead evidence. Without giving him an opportunity or even letting the petitioner know that statements were recorded, the Deputy Commissioner of Police has relied on statements of 11 persons. It is true that general allegations are only required to be made in the notice, but when statements are relied upon for the externment order at least, the person to be affected by such order should be given an opportunity to explain at least the general nature of allegations in the statements. The petitioner was, therefore, deprived of the opportunity to explain the circumstances, which weighed considerably with the Externing Authority and, therefore, also the order vitiates."

12. I have considered the observations made by the Division Bench of this Court as well as the Bombay High Court. The material question is that before passing the externment order, show cause notice is necessary and the same has been considered to be mandatory. Therefore, it is the duty of the respondent No.1 to give effective and reasonable opportunity to the petitioner referring all the materials taken into consideration by the respondent No.1. If any material is left out and not disclosed in the show cause notice and the same is considered in the externment order, then it amounts to not giving an effective and reasonable opportunity for tendering explanation against the show cause notice and the real purpose an object of Section 59[1], as enacted by the Legislature, will be frustrated. If any material has been taken into account by the respondent No.1 while

passing the externment order, then in that case, it ought to have been disclosed to the petitioner in the show cause notice so that the petitioner can effectively represent his case against the adverse material which has been collected and considered by the respondent No.1. Therefore, according to my opinion, the respondent No.1 has not given an effective reasonable opportunity to the petitioner and the order of externment, which has been passed by the respondent No.1 against the petitioner, is in fact passed in violation of principles of natural justice and, therefore, the order of externment dated 30/12/1999 and the order of the appellate authority dated 19/4/2000 deserve to be quashed and set aside.

13. In the result, the present petition is allowed. The order of externment passed against the present petitioner dated 30/12/1999 and the order passed by the appellate authority dated 19/4/2000 are hereby quashed and set aside. Rule is made absolute.

(H. K. Rathod,J.)

(vrpanchal)**